LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 9 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

October Term, 1971

No. 71-591

BETTY B. RAWLS,

Petitioner,

versus

THE CONDE NAST PUBLICATIONS INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVISSON F. DUNLAP
Counsel of Record

830 American Heritage Life Building
Jacksonville, Florida 32202
For Respondent

SEARS, DUNLAP & SEARS
830 American Heritage Life Building
Jacksonville, Florida 32202

DeWITT, NAST & DISKIN
420 Lexington Avenue
New York, N. Y. 10017

Of Counsel

INDEX

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

STATEMENT OF FACTS 2

A. Scope of Action 2

B. Facts 2

C. Proceedings in the District Court and Court of Appeals 3

ARGUMENT 3

THE DECISION BELOW IS CORRECT 5

THERE IS NO CONFLICT OF DECISION 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Page

Bush v. Louisville and Nashville Railroad Company, (5th Cir., 1958) 260 F.2d 854 6

Cason v. Baskin, (Fla. S Ct 1944) 155 Fla. 198, 20 So.2d 243 5

General Insurance Company of America v. Hercules Construction Co., (8th Cir., 1967) 385 F.2d 13 6

TABLE OF AUTHORITIES (Cont'd)

Cases (Cont'd)

Page

General Talking Pictures Corp. v. Western Electric Co., (1937) 304 US 175, 82 L ed 1273, 58 S Ct 849 5

Harms v. Miami Daily News, (Fla. D.C.A.3d, 1961) 127 So 2d 715 5

Houston Oil Co. v. Goodrich, (1918) 245 US 440, 62 L ed 385, 38 S Ct 140 4

National Labor Relations Board v. Pittsburgh Steamship Company, (1951), 340 US 498, 71 S Ct 453, 95 L ed 479 4

Rogers v. Missouri Pacific Railroad Company (1957) 352 US 500, 77 S Ct 443, 1 L ed 2d 493 7

Southern Power Co. v. North Carolina Public Service Co., (1924) 263 US 508, 68 L ed 413, 44 S Ct 164 5

United States v. Johnston, (1925) 268 US 220, 69 L ed 925, 45 S Ct 496 4

Whiteman v. Pitrie (5th Cir., 1955) 220 F.2d 914 8

OTHER AUTHORITIES

28 U.S.C. § 1254(1) 1

Rule 19, Rules of The Supreme Court of the United States 3, 4

67 Harvard Law Review 1441 7

Stern & Gressman, Supreme Court Practice 3rd Edition, 1962 4

In the
Supreme Court of the United States

October Term, 1971

No. 71-591

BETTY B. RAWLS,

Petitioner,

versus

THE CONDE NAST PUBLICATIONS INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The judgment of the United States District Court for the Middle District of Florida which was reversed by the Court of Appeals for the Fifth Circuit is printed in Petitioner's Appendix (Pet. App. 9). The Opinion of the Court of Appeals for the Fifth Circuit is reported at 446. F. 2d 313 and is printed in Petitioner's Appendix (Pet. App. 10-23).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals' decision in reversing the judgment entered upon Petitioner's claim of invasion of right of privacy, based upon an alleged wrongful publication of a photograph in which the Petitioner was not identified, creates any issue which would warrant the exercise of certiorari jurisdiction by this Court.

STATEMENT OF FACTS

A. Scope of the Action

The Petitioner's Complaint contained two counts (Pet. App. 1-5). Count One sought compensatory and punitive damages for an alleged trespass and invasion of her home and the improper taking of pictures in her home without her consent; Count Two sought compensatory and punitive damages for an alleged invasion of her privacy arising from the wrongful publication in *Vogue* magazine of one of the pictures which had been taken in her home. Count Two realleged the factual allegations of Count One and added as the only basis for the additional count, the wrongful publication of a picture of her chair and footstool which appeared in the February 1, 1969 issue of *Vogue* magazine as part of an advertising layout. The Court of Appeals found that Count Two alleged a claim for invasion of privacy by a wrongful publication of a picture (Pet. App. 22).

B. Facts

The facts emerging from the evidence at the trial are stated fully in the Opinion of the Court of Appeals (Pet. App. 11-13; 446 F. 2d at pp. 314, 315).

C. Proceedings in the District Court and Court of Appeals

In the District Court, the jury returned a verdict for the Defendant on Count One and a verdict for the Plaintiff on Count Two in the amount of $5,000 compensatory damages and $50,000 punitive damages. The District Judge denied Plaintiff's motion for a new trial as to Count One and Defendant's motion for judgment notwithstanding the verdict as to Count Two, and a judgment was entered upon the verdict.

Upon appeal, the Court of Appeals affirmed the judgment of the District Court as to Count One, reversed the judgment as to Count Two and subsequently denied the Petitioner's petition for rehearing.

ARGUMENT

The issue in the present case is narrow and unique to its facts and no amount of rhetoric can convert it into one warranting review on certiorari.

The petition seeks to have this Court review the factual determination of the Court of Appeals. The Petitioner's attempt to turn this conventional action of the Court of Appeals, in correcting a legal error in the lower court, into a constitutional issue, is not well founded. There is no showing made in the petition that there are here present any special or important reasons, indicated in Rule 19 of the Rules of this Court, for the exercise of this Court's discretion to grant the writ. The decision below turns upon its own particular facts and the applicable local law.

The basis of Petitioner's argument is the unique and unusual contention that Florida law in right of privacy actions based upon a publication of a photograph, requires no identification of the plaintiff.

Petitioner contends that the Court of Appeals improperly analyzed her cause of action in Count Two as a claim for wrongful publication, rather than a hybrid count which included a claim for physical intrusion, in an attempt to avoid the requirement of identification. It is significant that the Petitioner does not cite a single decision or authority in support of her view that a wrongful publication claim requires no identification of the plaintiff.

Under such a situation involving a consideration of particular facts, it is clear that this Court, under Rule 19 of its Rules, and under numerous decisions with respect to the exercise of its certiorari jurisdiction, has declared it will not interfere with a judgment of a Court of Appeals where its conclusions depend solely upon an analysis of the particular facts involved. *Stern & Gressman,* Supreme Court Practice § 4-14, 3rd Ed. 1962. As well stated by Justice Frankfurter in *National Labor Relations Board v. Pittsburgh Steamship Company,* 340 US 498, 71 S Ct 453, 95 L ed 479, at pp. 502, 503 of 340 US:

> The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.
>
> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.

On many occasions this Court has held it would not grant a writ of certiorari merely to review the evidence or inferences drawn from it, or discuss specific facts. *United States v. Johnston,* 268 US 220, 227, 69 L ed 925, 926, 45 S Ct 496; *Houston Oil Co. v. Goodrich,* 245 US 440, 62 L ed 385, 38 S Ct 140;

Southern Power Co. v. North Carolina Public Service Co., 263 US 508, 68 L ed 413, 44 S Ct 164, *General Talking Pictures Corp. v. Western Electric Co.*, 304 US 175, 178, 82 L ed 1273, 1275, 58 S Ct 849.

THE DECISION BELOW IS CORRECT

A review of the Opinion of the Court of Appeals below shows clearly that its decision in reversing the jury verdict as to Count Two was correct. The Court of Appeals properly held that the Petitioner's claim in Count Two of the Complaint was one for invasion of privacy by publication of the picture and may not be enlarged into something else (Pet. App. 22).

The Petitioner does not refute the Florida law, cited by the Court of Appeals, which holds that in a wrongful publication case there must be a public identification of the plaintiff, her home or possessions in order to violate a claim for invasion of privacy. *Cason v. Baskin*, Fla. S Ct 1944, 155 Fla. 198, 20 So. 2d 243; *Harms v. Miami Daily News*, Fla. D.C.A. 3d, 1961, 217 So. 2d 715 (Pet. App. 19). The Petitioner does not dispute the finding of the Court of Appeals that as a matter of law there was no evidence of any identification of the plaintiff in the picture published in *Vogue* magazine. Since there is no evidence in the record showing the required identification of the plaintiff under Count Two, the alleged erroneous charge to the jury relating to implied consent, with respect to the physical intrusion of the plaintiff's home, is not determinative of or important to the resolution of Petitioner's claim in Count Two. Therefore, any alleged error with respect to the jury charge on actual or implied consent, is harmless.

In the Court of Appeals Petitioner sought to have the jury verdict against her as to Count One reversed and a new trial

ordered, and sought to have the Court of Appeals, as to Count One, do what it did with respect to Count Two, namely, reverse a jury verdict. In making such contention before the Court of Appeals, the Petitioner did not appear to be concerned that such action might involve a violation of the Seventh Amendment if the Appellate Court set aside the Respondent's verdict of Not Guilty on Count One.

The Court of Appeals properly held that the instructions, considered as a whole, were in accordance with the law. In view of the Second and Sixth Defenses of the Petitioner (Pet. App. 7, 8) raising the defenses of consent, implied consent, waiver and estoppel, and the evidence which showed the Petitioner permitting the agents of the Respondent to remain in her home and continue to take the photographs, the trial court properly instructed the jury to consider such evidence in determining the Petitioner's right to recover damages with respect to the physical intrusion claim. The Court of Appeals followed the proper rule in reviewing the disputed charge by considering the instruction as a whole and not out of context. *General Insurance Company of America v. Hercules Construction Co.*, (8th Cir., 1967) 385 F. 2d 13, 24; *Bush v. Louisville and Nashville Railroad Company*, (5th Cir. 1958) 260 F. 2d 854, 857.

THERE IS NO CONFLICT OF DECISION

Petitioner seeks to have this court exercise its certiorari jurisdiction on the ground that the decision below is erroneous because it appears to be in conflict with the general rules of law found in certain decisions of this Court, which were adjudicated upon different factual situations and involve other fields of the law. Manifestly there is no important question

requiring decision by this Court, since this case only involves the interest of this particular litigant. There is no assertion of any conflict between decisions of the Courts of Appeals or of any of the other reasons set forth in Rule 19 of this Court. There is no real conflict shown in the cited decisions of this Court on the same matter or law presented under the facts of this case, but only an asserted claim of conflict in the general principles utilized in those decisions.

Petitioner does not cite any right of privacy cases in this Court in conflict with the decision of the Court of Appeals or any other cases which, on the individual facts presented herein, are controlling or persuasive. Petitioner relies principally on a selected group of F. E. L. A. cases, supplemented by several cases under the Jones Act (Merchant Marine), Longshoremen's and Harbor Workers' Compensation Act, to support her contentions. It has been recognized by both this Court and the authorities that, because of the unique problems which had arisen in connection with the federal statutes involved in those cases, this Court, in a selected group of those cases, has exercised certiorari jurisdiction to review the decisions of courts of appeals which had reversed trial court judgments based upon jury verdicts. *Rogers v. Missouri Pacific Railroad Company*, 352 US 500 at p. 510, 77 S Ct. 443 and 1 L ed 2d at p. 493, and the dissenting opinion of Mr. Justice Frankfurter at p. 524 of 352 US; 67 Harvard Law Review 1441. No such particularized problems are asserted in the case at bar. It should be pointed out that the cases cited by the Petitioner do not deal with the problem, as presented in this case, where the District Court gave the case to the jury upon an erroneous view of the essential elements required for a particular cause of action. Petitioner's selected cases mainly concern whether there was a sufficient quantum of evidence for the cause to be submitted to the jury for decision. Additional cases cited by the

Petitioner are criminal cases which involve different rules with respect to the required quantum of evidence and multiple verdicts than are involved in civil cases.

The Seventh Amendment does not prevent the Court of Appeals from reviewing questions of law presented by the decision of a trial court on post trial motions when the action of the trial court amounts to a legal error. *Whitman v. Petrie*, (5th Cir. 1955) 220 F. 2d 914. The tortured factual speculation which the Petitioner engages in with respect to the verdicts on Count One and Count Two is illustrative of the factual speculation which Petitioner urges upon this Court as a ground for the exercise of its jurisdiction. The observation of the Court of Appeals with respect to the jury's verdict on Count One was made after their resolution of the identification issue with respect to Count Two (Pet. App. 21) and was labelled as an observation. This is the slender reed upon which the Petitioner rests her claim of a violation of her constitutional rights under the Seventh Amendment.

In none of the alleged cases cited by Petitioner as controlling Florida Law (Pet. 5), which the Petitioner claims the Court of Appeals ignored, was there an element of waiver or estoppel or implied consent presented in the facts of the case. They clearly do not, under the facts present in this case, support Petitioner's contention as to the status of the Florida law.

The decision of the Court of Appeals has not been shown to be wrong so as to present a substantial constitutional question, nor does it present an unusual case which raises any significant legal questions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVISSON F. DUNLAP
Counsel of Record

830 American Heritage Life Building
Jacksonville, Florida 32202

For Respondent.

SEARS, DUNLAP & SEARS
830 American Heritage Life Building
Jacksonville, Florida 32202

DeWITT, NAST & DISKIN
420 Lexington Avenue
New York, N. Y. 10017

Of Counsel

December, 1971